This brings us to the only possible question in this case. It is admitted that the federal constitution neither cedes exclusive jurisdiction in the field of sedition to Congress, nor denies such jurisdiction to the States. Thus the only remaining proposition to be decided is whether the Congressional action in the form of the Smith Act has preempted the field. Preemption or suspension of inherent and unquestioned powers of the sovereign States is not a thing to be treated lightly. It can be effected only by Congressional specification or conflict.

In such Congressional specification the intent must be clear. It is admitted that the Smith Act contains no provision of exclusive jurisdiction, either express or implied. Moreover, not only is the intent of exclusive jurisdiction not apparent at all, much less clear, but Congressional intent to the contrary is apparent in the provision of Section 3231 of the Federal Code of Crimes and Criminal Procedure of 1948 (which includes the Smith Act) that

> "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

Add to this the testimony of the author of the Smith Act, Mr. Smith himself, that Congress did not intend that the act supersede any State sedition laws. Add also the fact that at the time of passage of the Smith Act there were numerous State sedition laws in effect, which Congress well knew. It is hardly possible that Congress would have intended to abolish such

a great mass of existing legislation of such importance by inference only and without explanation or even statement of intent, especially when there would inevitably be doubt at least of the validity of such supersession without affirmative provision therefor. If Congress had really intended to supersede the State laws, it could easily have said so, and surely would have said so in order to be sure to accomplish the desired result and remove any doubt.

This leaves only the possibility of "conflict" to support the decision of the majority of the Pennsylvania Supreme Court. Such conflict must be absolute to the point of repugnance, and impossible of reconcilement. As stated by Chief Justice Hughes in *Kelley v. Washington*, 302 U. S. 1 (1937),

> ". . . The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' "

It is difficult to conceive of any criminal statute of a State being in *conflict* with a federal criminal statute, since they merely permit prosecution by different sovereignties for crimes committed against each respectively, neither having anything to do with nor any effect upon the other. No regulations or administrative procedures are involved. And as pointed out by the Attorney General of Pennsylvania in his brief, it is believed that this Court has never held a federal criminal statute to supersede a State criminal statute.

It is submitted that *Gilbert v. Minnesota*, 254 U.S. 325 (1920), governs the case at bar. It was there held that a State statute prohibiting advocation of non-enlistment in the United States armed forces, and non-assistance to the United States in the prosecution of war did not conflict with and was not superseded by the federal Espionage Act of 1917, which contained substantially similar provisions. The majority of the Pennsylvania State Court brushed lightly over that case with the remark that it could be distinguished as merely permitting "a State's exertion of its conceded power to punish a breach of the peace." But the language of this Court was a lot stronger and went a lot further than that when it said:

> " . . . the State is not inhibited from making 'the national purposes its own purposes, to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes."

Far from being in conflict, the provisions of the Pennsylvania sedition act are similar to those of the Smith Act. Both are designed for the same purpose. The Pennsylvania act certainly can be enforced without any effect one way or the other on the Smith Act. There is not only no conflict, but State enforcement of such a similar law would inevitably be an indirect benefit to the federal government's efforts by affording the State and local police a means by which to assist and cooperate with federal officers.

Even if the Pennsylvania Supreme Court majority did believe, as they apparently did, that exclusive

federal enforecment of security laws would be more effective than permitting simultaneous State enforcement, it is only a matter of opinion as to whether such exclusive federal jurisdiction would be more satisfactory and effective, and certainly mere opinion of comparative efficiency of the respective sovereignties, and even ascertainment of such comparative abilities, can never constitute reason or justification for applying the rule of supersession where there is no necessary conflict, not even any inconsistency, between the federal law and the State law. Administering punishment for commission of a crime against the State cannot conceivably interfere with the administration of punishment by the federal government for commission of a crime against it.

The Pennsylvania Supreme Court majority held in effect that because of the great importance of the subject of sedition, Congress must necessarily have intended to preclude State jurisdiction (even though Congress refrained from stating any such intention) for fear of the possibilty that State enforcement might sometime conflict with federal enforcement, as, for instance, by permaturely arresting suspects under federal investigation. But such remotely possible eventuality would not constitute such a direct and positive conflict as would be necessary to effect supersession of the State law. In 1941 this Court, in discussing the problem of supersession by federal over State law, in *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, stated:

> "We deal . . . not with the theoretical disputes but with concrete and specific issues raised by

actual cases. . . . 'Constitutional questions are not to be dealt with abstractly.' . . . They will not be anticipated but will be dealt with only as they are appropriately raised upon a record before us. . . . Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress. . . .

"

"

". . . Futhermore, this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.'

"

"

". . . It is not sufficient . . . to show that the state Act *might* be so construed and applied as to dilute, impair, or defeat those rights (provided by the federal law). . . ."

Although the Pennsylvania Court's decision was expressly limited to holding invalid only that portion of the State law prohibiting seditious acts against the federal government, its stated reasons apply equally to acts against the State government. If the Supreme Court of the United States should uphold that decision, the result would be invalidation of all of the numerous presently existing State treason and sedition laws. Then where would the line be drawn? Wouldn't it be just as logical to say that because of the prime importance and actual necessity of collecting taxes to maintain and operate the federal government, federal tax statutes would necessarily and automatically supersede State taxing statutes, unless otherwise provided, since enforced collection by the State would or might impair the ability of the citizen to pay the federal government?

The majority of the Pennsylvania Court did not disapprove of the *Gitlow* case, supra, and *Whitney v. California*, 274 U. S. 357 (1927), but simply ignored them on the ground that there was no federal sedition act in effect at such times, the 1918 act having been repealed, and therefore the question of preemption could not have been raised. However, as pointed out by the Attorney General of Pennsylvania in his petition herein, at page 19, there was a federal statute in effect, the original act of 1917, minus only the provisions of the act of 1918, which had added an amendment to the 1917 act, and which amendment alone had been repealed. This would seem to take all of the props out from under the Pennsylvania Court's decision, as under these actual circumstances, the *Gitlow* and *Whitney* cases, both by this Court, are unimpeachable authority for sustaining the Pennsylvania statute.

The Pennsylvania Court relies heavily on *Hines v. Davidowitz*, 312 U. S. 52 (1941), and in fact it is really its only affirmative authority. But its analogy will not stand close scrutiny. The *Hines* case invalidated a Pennsylvania Alien Registration Act on the ground of supersession by the federal Registration Act of 1940, even though the federal act did not so declare. That decision was undoubtedly correct, within its proper sphere of application, but has no bearing on the case at bar. This Court itself in the *Allen-Bradley* case, supra, distinguished the *Hines* case on the fact that the Alien Registration Acts involved the handling of foreign nationals, and touched a field in which federal interest is so dominant as to preclude administration of State laws therein, which

could easily interfere with the federal administration. The handling of the same foreign affairs by 49 different and separate sovereignties would be so likely to cause international friction and lead to war that they must of necessity be left up to the federal government's control in behalf of all the States under an integrated system. No such disastrous results could possibly follow from enforcement of State treason and sedition laws, and therefore the *Hines* case has no application here. Again, the heaviest prop under the Pennsylvania Court's decision in the instant case seems to collapse.

Point 3

The defendant Steve Nelson has not been placed in double jeopardy in violation of the 5th amendment to the federal constitution.

Argument and Authorities

The prop of double jeopardy injected by the Pennsylvania State Court to support its decision in this case is similar to the drowning man's grasp for the straw. That Court cites no authority for its view, whereas numerous authorities are cited and discussed by Mr. Justice Bell in his dissenting opinion, and by the Commonwealth of Pennsylvania in its petition filed herein at page 46 thereof, to illustrate the settled rule that the prohibition of double jeopardy contained in the 5th amendment to the federal constitution does not apply to and restrict State court proceedings, but only those of the federal courts. This is made clear in *Gilbert v. Minnesota*, 254 U. S.

325 (1920), *United States v. Lanza*, 260 U. S. 377 (1922), *McKelvey v. United States*, 260 U. S. 353 (1922), and *Jerome v. United States*, 318 U. S. 101 (1943). In the *Jerome* case this Court stated:

> " . . . the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained. . . ."

In any event, it is elementary that the defense of double jeopardy can be entertained only in a *subsequent* trial for the same offense, never in the first trial. Therefore, since the Pennsylvania proceeding complained of was first in point of time, there could not be any issue of double jeopardy.

VII.

CONCLUSION

It is respectfully submitted that this case is a proper one for review by this Court, and that the Petition for Writ of Certiorari should be granted.

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Supreme Court of the United States.

OCTOBER TERM, 1954.

No. 236.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

STEVE NELSON,
Respondent.

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

This brief of the Commonwealth of Massachusetts is filed under Rule 42 of the Supreme Court of the United States in support of the petition for writ of certiorari filed by the Commonwealth of Pennsylvania in the case of *Commonwealth of Pennsylvania* v. *Steve Nelson,* October Term, 1954, No. 236, reported below in 377 Pa. 38, 104 A. (2d) 133, reargument denied in 377 Pa. at page 60. Jurisdiction of this court was invoked under 28 U.S.C. § 1257(3). Since this brief is sponsored by the Attorney General of Massachusetts, consent of the parties is not required.

Massachusetts adopts the Questions Presented for Review and the Statutes Involved contained in the Brief for

Pennsylvania at pages 4 and 5, and the Statement of the Case in said brief at page 9.

Interest of Amicus Curiae.

1. The Commonwealth of Massachusetts, by indictment returned September 1, 1951, in Middlesex County, charged that one Margaret Gilbert and one Martha H. Fletcher did, on January 1, 1947, and on divers other days between that date and the presentment of the indictment—

> "conspire together and with Dirk J. Struik and Harry E. Winner to advocate, advise, counsel and incite the overthrow by force and violence of the government of the Commonwealth of Massachusetts by speech, exhibition, distribution and promulgation of certain written and printed documents, papers and pictorial representations, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

This conspiracy charge was based on the Massachusetts sedition law, G.L. (Ter. Ed.) c. 264, sec. 11, as appearing in section 1 of chapter 160 of the Acts of 1948.

Section 11 provides:

> "SECTION 11. Whoever by speech or by exhibition, distribution or promulgation of any written or printed document, paper or pictorial representation advocates, advises, counsels or incites assault upon any public official, or the killing of any person, or the unlawful destruction of real or personal property, or the overthrow by force or violence or other unlawful means of the government of the commonwealth or of

the United States, shall be punished by a fine of not more than one thousand dollars, or by imprisonment for not more than three years, or both; provided, that this section shall not be construed as reducing the penalty now imposed for the violation of any law. It shall be unlawful for any person who shall have been convicted of a violation of this section, whether or not any sentence shall have been imposed, to perform the duties of a teacher or of an officer of administration in any public or private educational institution, and the superior court, in a suit by the commonwealth, shall have jurisdiction in equity to restrain and enjoin any such person from performing such duties thereafter; provided, that any such restraining order or injunction shall be forthwith vacated if such conviction shall be set aside." (As amended by St. 1948, c. 160, sec. 1.)

This statute is similar to the Pennsylvania law in this case (R. 8a).

The Supreme Court of Illinois, on habeas corpus, upheld extradition to Massachusetts in that case on May 20, 1953, rehearing denied September 21, 1953, reported in *People, ex rel. Gilbert,* v. *Babb, Sheriff*, 415 Ill. 349.

A motion to quash said indictment, based on the Nelson decision, has been reported without decision to the Supreme Judicial Court of Massachusetts for a ruling on questions raised by the motion to quash, including the question of whether the Massachusetts law has been superseded by the federal Smith Act of 1940 or any other federal law.

2. The Commonwealth of Massachusetts, in a second case, in Suffolk County, by indictment No. 2457, returned May 20, 1954, charged Daniel Boone Schirmer, Ann Burlak

Thompson, Barbara Bennett Rosenkrantz, Herbert Zimmerman, Edith Abber, Otis Archer Hood and Franklin P. Collier, Jr., on January 1, 1949—

> "and on divers other days and times between that day and the day of the presentment of this indictment, did conspire together to commit thereafter, from time to time and on different occasions as opportunity therefor should offer and not at any times then particularly set and fixed, the crime of advocating, advising, counseling, and inciting, by speech and exhibition, distribution and promulgation of written and printed documents, papers and pictorial presentations, assaults upon public officials, the killing of persons, the unlawful destruction of real and personal property, and the overthrow by force and violence and unlawful means of the government of the Commonwealth of Massachusetts and the government of the United States."

Motions to quash said indictment were reported to the Supreme Judicial Court without decision for a ruling on the questions raised by the motions, including a ruling on the question of whether the Smith Act of 1940 or the Internal Security Act of 1950 has superseded state sedition laws, such as section 11 of chapter 264, quoted above.

3. The Commonwealth of Massachusetts, by indictment No. 1924, returned April 8, 1954, in Suffolk County, charged that one Otis Archer Hood on the 17th day of November, 1951—

> "and on divers other days and times between that day and the day of the presenting of this indictment, did become and remain a member of a certain organiza-

tion, to wit; the Communist Party, knowing it to be a subversive organization."

This indictment was based on General Laws (Ter. Ed.) c. 264, sec. 19, as inserted by section 3 of chapter 805 of the Acts of 1951.

Section 19 provides:

"SECTION 19. Any person who becomes or remains a member of any organization knowing it to be a subversive organization shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than three years or both, provided that this section shall not be construed as reducing the penalty now imposed for the violation of any law." (As amended by St. 1951, c. 805, sec. 3.)

Section 16 provides:

"SECTION 16. The term 'subversive organization' as used in sections seventeen, eighteen, nineteen, twenty-one, twenty-two and twenty-three of this chapter shall mean any form of association of three or more persons, however named or characterized, and by whatever legal or non-legal entity or non-entity if be established, and whether incorporated or otherwise for the common purpose of advocating, advising, counseling or inciting the overthrow by force or violence, or by other unlawful means, of the government of the commonwealth or of the United States." (As amended by St. 1951, c. 805, sec. 3.)

Section 16A provides:

"SECTION 16A. The Communist Party is hereby declared to be a subversive organization." (As amended by St. 1951, c. 805, sec. 3.)

A motion to quash the indictment was reported to the Supreme Judicial Court without decision for a ruling on the questions raised by the motion to quash, including the question of supersession.

This membership section is similar to the membership count in the Nelson indictment (R. 4a).

A ruling by this court on the question of supersession raised in this case would control the decision of the Supreme Judicial Court in the aforesaid cases. Therefore the Commonwealth is vitally interested in having this court hear this case.

Reasons for Allowing Certiorari.

I. The decision of the Pennsylvania Supreme Court in the *Nelson* case conflicts with the decision of the New Hampshire Supreme Court in the case of *Nelson* v. *Wyman*, —N.H.—, 105 A. (2d) 756, decided on April 30, 1954, where the court expressly refused to follow the Pennsylvania court, saying:

> "The enactment by Congress of the Smith Act (18 USC Sec. 2385) which defines and penalizes sedition and subversive activities against the governments of the United States, the states or any of their subdivisions, does not preclude state legislation on the same subject matter. Insofar as Penn. v. Nelson, 104A 2d 133, gives support to the proposition that it does, we do not adopt it." (105 A. (2d) at p. 769.)

Thus a conflict between the states exists which should be resolved by this court.

II. The Pennsylvania Supreme Court has decided a federal question of substance in a way we believe is probably

not in accord with applicable decisions of this court, to wit, that a federal sedition act supersedes state sedition laws.

This seems contrary to the principle of *Gilbert* v. *Minnesota*, 254 U.S. 325.

There the court quoted without disapproval the holding in *State* v. *Holm*, 139 Minn. 267, "where after a full discussion the contention was rejected that the Espionage Law of June 15, 1917, abrogated or superseded the statute, the court declaring that the fact that the citizens of the State are also citizens of the United States and owe a duty to the Nation, does not absolve them from duty to the State nor preclude a state from enforcing such a duty. 'The same act,' it was said, 'may be an offense or transgression of the laws of both' Nation and State, and both may punish it without a conflict of their sovereignties." (254 U.S. at 329.)

III. The Pennsylvania Supreme Court in the *Nelson* case has decided a federal question of substance not heretofore decided by this court, to wit, that the federal Smith Act (18 U.S.C. sec. 2385) has superseded state sedition laws (R. 64a).

It is of the utmost importance to the states that this question should be decided authoritatively by this court, as was pointed out by the concurring justices in the Pennsylvania Supreme Court (R. 80a.)

As of 1949, thirty-seven states had passed laws defining and punishing sedition, syndicalism and other activities aimed at the overthrow of our government by force (R. 90a). The validity of these laws would be questioned if this case is not heard by this court.

The large number of states which have joined in the brief prepared by the Attorney General of New Hampshire and

sponsored by the National Association of Attorneys General indicates the extent of their concern for the effect of the Pennsylvania decision. The Commonwealth of Massachusetts expressly adopts and joins in the arguments and contentions raised and set forth in said brief, and urges that they be adopted and followed by this court.

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 326

Commonwealth of Pennsylvania,
Petitioner,

vs.

Steve Nelson,
Respondent.

Brief of *The State of New Hampshire* as Amicus Curiae in Support of the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

Joined by the Attorneys General of:

Arizona	Maryland	New York
Connecticut	Massachusetts	North Carolina
Florida	Michigan	Ohio
Georgia	Mississippi	South Carolina
Indiana	Montana	Tennessee
Kansas	Nebraska	Virginia
Louisiana	Nevada	Washington
Maine	New Mexico	Wisconsin

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 236

Commonwealth of Pennsylvania,
Petitioner,

vs.

Steve Nelson,
Respondent.

Brief of *The State of New Hampshire* as Amicus Curiae in Support of the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

Joined by the Attorneys General of:

Arizona	Maryland	New York
Connecticut	Massachusetts	North Carolina
Florida	Michigan	Ohio
Georgia	Mississippi	South Carolina
Indiana	Montana	Tennessee
Kansas	Nebraska	Virginia
Louisiana	Nevada	Washington
Maine	New Mexico	Wisconsin

Authority for this Brief

This brief is filed by The State of New Hampshire, acting by its Attorney General, Louis C. Wyman, joined by 24 states by their respective Attorneys General, in accordance with the revised Rules of the Supreme Court of the United States, Rule 42, paragraph 4.

Opinions Below

Commonwealth v. *Nelson*, Superior Court of Pennsylvania, reported in 172 Pa. Sup. Ct. 125, 92 A. 2d 431.

Commonwealth v. *Nelson*, Supreme Court of Pennsylvania, reported in 377 Pa. 38, 104 A. 2d 133.

Re-Argument denied by order of the Supreme Court of Pennsylvania, 377 Pa. 60.

Jurisdiction

Remedies within the Commonwealth of Pennsylvania have been exhausted before its Supreme Court by petitioner for certiorari. Petition for re-hearing was denied on April 27, 1954. Jurisdiction is submitted to rest on 28 U.S.C. 1257 (3) and Rule 19, 1-a of Part 5 of the Rules of the Supreme Court of the United States. The decision of the Pennsylvania Supreme Court involved a federal question of substance not believed to have been heretofore determined by this Honorable Court and in a manner not in accord with applicable decisions of the Supreme Court of the United States.

Question Presented

Whether Title 18, U.S. Code, s. 2385, enacted June 25, 1948, 62 Stat. 808, 18 U.S.C.A., s. 2385, supersedes by implication s. 4207, Pennsylvania Penal Code of 1939, 18 Purd. Penna. Stat. Ann. 4207, as set forth in the Petition for Writ of Certiorari, p. 6.

Statutes Involved

Section 2385 of the *Federal Code of Crimes and Criminal Procedure* of June 25, 1948, 62 Stat. 808; 18 U.S.C. 2385:

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

"Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

"shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction."

Section 3231 of the *Federal Code of Crimes and Criminal Procedure*, June 25, 1948, c. 645, 62 Stat. 826; 18 U.S.C. 3231:

"The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

"Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

Section 4207 of the *Pennsylvania Penal Code of 1939*, 18 Purd. Penna. State. Ann. 4207. (*Petition for Writ of Certiorari*, p. 6)

Preliminary Statement

We, the undersigned Attorneys General of several states of the Union for our several States respectfully file this brief *amicus curiae*, believing deeply that the majority opinion of the Supreme Court of Pennsylvania in the principal case is contrary to the supreme law of the land, contrary to numerous previous decisions of this Court, unsound in theory and practice, and violative of States' Rights. If the opinion of the Pennsylvania majority should be affirmed by this Honorable Court, it will destroy long-standing

legislation in many of the States of the Union which has sought to protect the security of the States against sedition and subversion.

We believe that no provision of the Constitution expressly grants to the federal government the power to legislate exclusively in matters of subversion, sedition, or treason, whether in respect to State Sovereignty or national sovereignty. We believe, even though this Honorable Court should hold that the Constitution gives to the Federal Government power to exclude state laws prohibiting subversion or sedition, that examination of the legislative history of the *Smith Act* shows clearly that Congress never intended to assert exclusive jurisdiction in this vital field. We feel strongly that judicial doctrine of supersession by implication in such matters is dangerous doctrine and bad law, running counter to every known precept of careful statutory construction.

For our several States, we respectfully urge this Honorable Court to hold that each of the several States of the Union possesses the reserved police power to enact legislation making criminal attempts to overthrow its sovereign government or the government of the United States or either of them by force and violence or other unlawful means. For this purpose we submit that from any reasonable viewpoint an attempt to overthrow the government of the United States is *per se* a clear and present danger to the safety, security and sovereignty of any State Government within whose jurisdiction such an attempt is made, and that this is so regardless of whether the offenders seek the prior or contemporaneous overthrow of the particular State Government within whose borders they act.

We have filed this brief as friends of the Court because of the vital importance to all of the States of the decision in this matter. It is confined entirely to a discussion of what we respectfully assert to be the error of law committed by the Supreme Court of Pennsylvania in holding the *Smith Act* to have impliedly superseded all state statutes in matters of subversion or sedition.

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Summary of Argument

Since Congress did not say in the *Smith Act* that it superseded State (anti-subversive and sedition) laws, the fiction of implied intent to supersede has been improperly ascribed to this federal law by the Pennsylvania Supreme Court. Congressional debates prior to its enactment find Congressman Smith, author of the Act itself stating on the floor of the House of Representatives that the *Smith Act* ". . . has nothing to do with state laws." And prior to this significant statement a study of hearings before the House Judiciary Committee reveals that the members of that Committee, favorably reporting the *Smith Act*, had reviewed and discussed the *Gitlow* case, which emphasized the validity and enforceability of concurrent State laws concerned with sedition and subversion. Had there been any intention to supersede State laws, Congress would have specified supersession in the *Smith Act* itself. In fields of such grave and vital importance to the safety and security of the forty-eight sovereign States, Congress should be required to specify supersession so that the States' U.S. Senators and Representatives may know the full scope of their yeas or nays.

It is respectfully contended that Congress could not constitutionally supersede the reserved police power of the States to make it a crime to advocate or seek to overthrow the *States* themselves by force and violence. It is believed to be doubtful whether Congress has power to supersede State laws making it a crime within each State to advocate or seek to overthrow the *United States* in view of the immediate inseparable danger to each State itself

from such subversive advocacy or activity, and in view of the failure of the Constitution itself to grant such an express power to the Federal Government.

However, the principal case is not believed to require a decision on what Congress could or could not do vis-a-vis State laws because the record shows no valid basis to support a finding of supersession by implication. Only in the event this Honorable Court should find such implied supersession would it reach the problem of whether Federal supersession of such basic and vital State laws is itself constitutional. Nor is there such repugnancy or conflict between the *Smith Act* and the various State laws as to warrant a finding that State anti-subversive and sedition laws hamstring or render ineffectual the Federal proscription. On the contrary, a careful examination of the provisions of all, reveals correlative, complementary, concurrent Federal and State legislation in a field of vital concern *both* to the Federal Government *and* to the separate States. None of the authorities cited by the majority are believed to support either the holding or the reasoning stated in the principal case in reference to the judicial fiction of supersession by implication.

In the current setting of national and international affairs, a more important matter for resolution by the Supreme Court of the United States would be difficult to conceive. Basic fundamental, and heretofore considered inviolate, reserved powers of each of the States in the Federal Union are rejected by the majority decision of the Pennsylvania Supreme Court, which this Honorable Court is respectfully urged herein to reverse and remand.

Argument

I. NEITHER EXPRESSLY NOR BY IMPLICATION HAS FEDERAL LAW ATTEMPTED TO TAKE FROM THE STATES THE POWER TO ENACT ANTI-SUBVERSIVE LEGISLATION.

a. *No express Federal supersession exists.*

The majority opinion of the Supreme Court of the Commonwealth of Pennsylvania concedes that relevant federal law is

2385, *Federal Code of Crimes and Criminal Procedure*, June 25, 1948, 62 Stat. 808, 18 U.S.C. 2385, otherwise known as the *Smith Act*) does not expressly provide that it shall supersede conflicting concurrent or cumulative provisions of state law.

See: *Opinion, Supreme Court of Pennsylvania*, 377 Pa. 38, 104 A.2d 133; *Appendix to Petition for Certiorari*, pp. 68a, 69a.

Neither respondent nor any other known source has ever contended that Congress expressly superseded State laws in its *Smith Act*. It is submitted that this fact, standing alone, is significant in determining the intent of Congress, inasmuch as words of art to accomplish such a purpose are well known to Congress and have been used upon repeated occasions where supersession has been intended. Furthermore, in the re-enactment in 1948 of Title 18, U.S.C., of which the *Smith Act* was a part, s. 3231 of that Title explicitly provided that:

> ". . . Nothing in this Title shall be held to take away or repeal the jurisdiction of the courts of the several states under the laws thereof." 62 State., c. 645, s. 826, June 25, 1948.

This reservation of state court jurisdiction was not new but was based in turn upon the 1940 Edition of U.S.C., Titles 12 and 18, and was formed by combination of ss. 546 and 547 of Title 18, U.S.C., 1940 Edition, with s. 588d of Title 12, without change of substance. It is apparent from even a cursory examination of this reservation, including reference to *House Report No. 304* of the *80th Congress*, 1st. Session, that the Judiciary Committee had considered such offenses as bank robbery, killing and kidnapping, (as to which concurrent federal-state jurisdiction is notorious) in merging s. 588d of Title 12 into s. 3231, *supra*. The old s. 588d read:

> "Jurisdiction over any offense defined by sections 588b and 588c of this Title shall not be reserved exclusively to courts of the United States."

The concluding notation of *House Report No. 304, 80th Congress*, 1st Session, *supra*, stated (p. A148):

"The phraseology was considerably changed to effect consolidation *but without any change of substance*." [Emphasis supplied]

b. *Neither the Smith Act, nor any other Federal Statute, supersedes State anti-subversive laws by implication, including the Pennsylvania-Sedition Act (s. 4207 of the Pennsylvania Penal Code of June 24, 1939).*

The *Smith Act* actually complements many State statutes dealing with sedition and subversion. It was first enacted at a time when numbers of State anti-sedition statutes were in existence and had been since the end of World War 1.

See: Gellhorn, *The States and Subversion* (App. B, p. 414) Cornell Univ., Press, 1952.

It is not a registration statute with attendant detailed federal administrative requirements. In no respects does it conflict with the provisions of the Pennsylvania Sedition Act, nor with other State statutory provisions. The jurisdiction of State courts, being concurrent, is dual.

Albertson v. *Millard*, 106 F. Supp. 635, 641 (E.D. Mich. 1952)

See: *Robb* v. *Connelly*, 111 U.S. 624

Cross v. *North Carolina*, 132 U.S. 131, 139.

Pearce v. *State*, 115 Ala. 115, 22 So. 502.

As a matter of chronology, the *Smith Act* post-dates the Pennsylvania Sedition Act. Its re-enactment in 1948 as a part of Title 18, U.S.C. post-dates other intervening legislative pronouncements such as:

Alabama: L. 1947, c. 60;
North Carolina: L. 1947, c. 1028.

In the language of Mr. Justice Frankfurter, it is essential to be continually on guard against "judicial proliferation of [legislative] purpose". In speaking of interpretation of congressional legislation regulating activities entwined with interstate commerce, Justice Frankfurter has cogently pointed out that

"When the federal government takes over such local radiations in the vast network of our national economic enterprise and thereby radically re-adjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective extension of meaning which properly deserves the stigma of judicial legislation." *Some Reflections on the Reading of Statutes by Mr. Justice Frankfurter*, THE RECORD of the Association of the Bar of the City of New York, Vol. 2, No. 6, June, 1947, pp. 213, 230, 1. 7.

cf. State Control of Subversion: A Problem in Federalism, 66 *Harv. Law. Rev.* 327 (1952)

i. ***An examination of the legislative history of the Smith Act compels the conclusion that Congress did not intend to supersede State laws.***

The author of the *Smith Act* was Representative Howard W. Smith of the Eighth District of Virginia. As indicated in his letter to the Attorney General of Pennsylvania (*Appendix to Petition for Certiorari*, p. 97a), he never had the faintest notion that Congress was nullifying the concurrent jurisdiction of the sovereign states. He was the sponsor of this legislation. His voting record and his constituency are from a State in which it is submitted that traditional position as a matter of judicial notice is that of a States' Rights Southern Democrat. An examination of the debates in the House of Representatives at the time when Congress was originally considering the *Smith Act* bears out the statements of Representative Smith in his letter, *supra*, which is a part of the record in the principal case. In the *Congressional* Record of July 29, 1939, at p. 14525, appears the following exchange between Representative Smith and Representative May:

"MR. MAY: Mr. Chairman, will the gentleman yield?

"MR. SMITH OF VIRGINIA: I will be pleased to yield to the gentleman.

"MR. MAY: I notice that the title just offered as an amendment provides penalties for conspiracy to overthrow the

government or to assassinate officers, or things of that sort. Is there any conflict in the penalty that is provided in the section referred to that fixes the penalty and the various penalties that may be provided in the various states that have statutes on the same subject?

"MR. SMITH OF VIRGINIA: *This has nothing to do with state laws.* This provides penalties for violations of this law. [Emphasis supplied]

"MR. MAY: I understand it is a federal statute, or will be when enacted; but I was just wondering if there was any more severity to be exercised under this law than under the usual state law."

The *Smith Act* was originally introduced by Representative Smith as an amendment to the Alien Registration Act of 1940 (18 U.S.C. c. 439, 54 Stat. 670). It was stated by its author to be of general application and not confined to aliens. In this sense it stands alone and thus has come to be referred to as the *Smith Act*, in contra-distinction to the broader title of which it was a part and which was considered by this Honorable Court in *Hines v. Davidowitz*, 312 U.S. 52. As Representative Smith said at the time of offering his amendment:

"Now I want to tell you what Title I does. We have heard a lot of talk here about abusing the poor aliens. The gentlemen who have been talking that way cannot complain about this section. We have laws against aliens who advocate the overthrow of this government by force, but do you know there is nothing in the world to prevent a treasonable American citizen from doing so? He can advocate revolution, the overthrow of the government by force, anarchy, and everything else, and there is nothing in the law to stop it. *This amendment makes it unlawful for any person, be he American citizen or alien, to advocate the overthrow of the government of the United States by force . . .*" *Congressional Record*, July 29, 1939, p. 10452. [Emphasis supplied]

The amendment offered by Representative Smith on July 29, 1939 followed full consideration of the original bill (H.R. 5138,

by the Committee on the Judiciary of the House of Representatives in the 76th Congress. An examination into the hearings before Sub-committee No. 3 of the House Committee on the Judiciary, Serial No. 3, on April 13, 1939, shows that at the time the Committee itself considered the provisions dealing with advocacy of the overthrow of the government of the United States or of any State, as proposed in H.R. 5138, it had very much before it the decision of this Honorable Court in *Gitlow* v. *The People of the State of New York*, 268 U.S. 652. In fact, one of the witnesses before the Committee, appearing in support of H.R. 5138, referred specifically to the parallel between these provisions and the Criminal Anarchy Act of New York State which was passed upon by this Honorable Court in the *Gitlow* case, *supra*. This witness (Mr. Trevor) testified in part as follows:

"MR. TREVOR: I think I am quite safe in saying that this draft is expressly within the terms of the decision that was handed down by the Supreme Court. That was a question involving litigation on freedom of speech, and as covered in this bill it is clearly within the terms of this decision of the Supreme Court.

"MR. HEALY: Do you have the citation of the *Gitlow* case?

"MR. TREVOR: Yes, sir . . .

. . . . .

"MR. SPRINGER: Speaking about the *Gitlow* case, did you give us the book and page where this is recorded?

"MR. TREVOR: It is *Gitlow* v. *The People of New York*, p. 652.

"MR. SMITH: 268 U.S.

"MR. HANCOCK: 268 U.S., page 652?

"MR. TREVOR: Yes. . . ."

From the foregoing, it is clear not only that the author of the Act himself stated that his act had nothing to do with state laws,

but that the members of the House Judiciary Committee, reporting the Act itself, did so with particular reference to the *Gitlow* case, in which this Honorable Court, through Mr. Justice Sanford, cited with approval *Gilbert* v. *Minnesota*, 254 U.S. 325, and said: (p. 667)

> "That a state, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. . . . Thus it was held by this Court in the Fox case [*Fox* v. *Washington*, 236 U.S. 273], that a state may punish publications advocating and encouraging a breach of its criminal laws; and, in the Gilbert Case, that a state may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.
>
> "And, for yet more imperative reasons, a state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlaw means. These imperil its own existence as a constitutional state. . . . And a state may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several states, by violence or other unlawful means. *People* v. *Lloyd*, 314 Ill. 23, 34. See also, *State* v. *Tachin*, 92 N.J.L. 269, 274; and *People* v. *Steelik*, 187 Cal. 361, 375. In short, this freedom does not deprive a state of the primary and essential right of self-preservation, which, so long as human governments endure they cannot be denied. *Turner* v. *Williams*, 194 U.S. 279, 294 . . .
>
> "By enacting the present statute the state has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare, and involve such danger of substantive evil, that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute . . . Such utterances, by their very nature, involve danger to the public peace and to the security of the state. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none

> the less real and substantial because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency . . ."

In the same sense, none of the States of the Union may constitutionally be required to defer reasonable measures for their own peace and safety to a claim of superseding federal authority, which although admittedly possessed of such excellent organizations as the Federal Bureau of Investigation, nevertheless of necessity is incapable of adequately covering immediate local danger to all the States of the Union throughout all the breadth and length of this land from such attempts to destroy their sovereignty by force and violence. The legislative history of the *Smith Act* is not barren on the question of lack of congressional intent to supersede State laws by implication. On the contrary, there is manifest throughout the thread of its history the fact that there was no intention to supersede concurrent state legislation, whether related to attempts to overthrow the government of the various states themselves or attempts to overthrow the government of the United States. It is worthy of note that in the Second Session of the 83rd Congress the same Congressman Smith of Virginia on March 3, 1954, introduced into the House of Representatives, H.R. 8211, which provided that there should be no supersession by implication of any Act of Congress and that all such Acts would not exclude state laws on the same subject-matter with-

out express provision to that effect. In view of this legislative history, it is submitted that the statement by the Supreme Court of Pennsylvania (*Appendix to Petition for Certiorari*, p. 71a, l. 19) that "federal pre-emption could hardly be more clearly indicated" is completely without foundation in law or in fact.

After 1948 still more States of the Union enacted laws prohibiting subversive activity within their borders:

Arkansas	Session Laws of 1951, chapter 401.
California	Deerings California Code—Corporations, sections 35000 *et seq.*
Florida	Laws 1953, chapter 392.
Georgia	Laws 1953, chapter 259.
Indiana	Laws 1951, chapter 226.
Louisiana	Acts of 1952, No. 506.
Maryland	Annotated Code of 1951, Article 85-A.
Massachusetts	Laws 1951, chapter 805, section 3.
Michigan	Public and Local Acts, 1952, chapter 117.
Montana	Laws 1951, chapter 215.
New Hampshire	Laws 1951, chapter 193.
New Mexico	Laws 1951, chapter 157.
Ohio	Laws 1953, chapter 208.
Pennsylvania	Laws 1951, chapter 454.
South Carolina	Acts and Joint Resolutions, 1951, No. 319.
Texas	General and Special Laws, 1951, chapter 8.
Virginia	Code of 1950, Title 18, sections 350, *et seq.*
Washington	Laws 1951, chapter 254.

To read into a federal statute dealing with matters of fundamental security to State and Nation a constructive implication of proscription of security measures by separate sovereign states of the Union is dangerous doctrine. Supersession by implication is at best but a post mortem attempt to reconstruct legislative intention. Such reconstruction should never reach the proportions of judicial legislation in fields of inextricably correlative State and National security.

See: *California v. Zook*, 336 U.S. 725, 728.
Ex Parte Dixon, 41 Cal. 2d 756, 264 P. 2d 513, 517.